LIBRARY
SUPREME COURT, U. S.

No. 71-645

Supreme Court, U.S.
FILED
DEC 10 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

JIMMY T. SMITH, an Individual, and SMITH SALES COMPANY, a Corporation
Petitioners

VERSUS

SCRIVNER-BOOGAART, INC., a Corporation
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JACK R. GIVENS
1700 Fourth National Bank Building
Tulsa, Oklahoma 74119
Attorney for Respondent

WAYNE R. SCOTT CO. — TULSA, OK. 74120
507 S. QUAKER • (918) 587 7806

HARVEY SHARP — OKLA. CITY, OK. 73102
3111 CITY NATIONAL BANK TOWER • (405) 232-0963

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Supplemental Statement of Facts 2

Reasons for Denying the Writ 14

I: *The verdict and decision of the jury and trial court is in accord with prior decisions of this Court, as affirmed by a unanimous panel of the Court of Appeals, including an Associate Justice of the United States Supreme Court, retired, sitting by designation.* 15

II: *At best, only a de minimis effect on commerce was demonstrated under the sublease in question, the advantages of which far outweighed any adverse effect, and no substantial federal question is presented.* 21

III: *The dire consequences of the decision predicted by the Petitioners simply are not supported by the facts.* 27

IV: *The Petitioners attempt to infuse theories and issues in their Petition for Certiorari either not raised or litigated in the trial court, or claim errors to which objection was not made at the time of trial.* 32

A. Price Fixing 32

B. Exclusive Dealing 33

C. The Verdict Form 34

D. Evidence of Damage 35

Conclusion 39

CITATIONS

Cases: *Page*

Fortner Enterprises v. U.S. Steel Corp.,
394 U.S. 495, 89 S.Ct. 1252, 22 L. Ed. 2d 495 ..... 19, 20

Northern Pacific Ry. Co. v. United States,
356 U.S. 1, 78 S.Ct. 514, 2 L. Ed. 545 20

Northern Ry. Co. v. Miller,
(CA 6th 1962) 285 F. 2d 202 37

Orloff v. United States,
(CA 6th 1946) 153 F. 2d 292 37

United States v. Standard Oil Company,
221 U.S. 1, 33 S.Ct. 502, 55 L. Ed. 619 20

Western Fire Insurance Co. of Fort Scott,
Kansas v. Word, (C.A. 5th, 1942) 131 F. 2d 541 35

White Motor Company v. United States,
372 U.S. 253, 83 S.Ct. 696,
9 L. Ed. 2d 738 (1963) 27, 38

Whitney v. Acres, D.C. Okla. 1965, 247 F. Supp. 763 ... 35

Statutes

Section 4, Clayton Act, 15 U.S.C., § 15 22

No. 71-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

JIMMY T. SMITH, an Individual, and SMITH SALES COMPANY, a Corporation
Petitioners

VERSUS

SCRIVNER-BOOGAART, INC., a Corporation
Respondent

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is styled Jimmy T. Smith, an Individual, and Smith Sales Company, a corporation, Appellants, v. Scrivner-Boogaart, Inc., a corporation, Appellee, No. 322-70, and is reported 447 F. 2d 1014 and 1971 CCH Trade Cases §73,611. The decision of that Court denying Petition for Rehearing filed therein on October 22, 1971 was in brief letter form and is not separately

reported. It is accurately shown as Appendix C to the Petition herein, page A12.

JURISDICTION

The Petitioners have invoked jurisdiction of this Court under 28 U.S.C. §1254(1), praying for a writ of certiorari.

SUPPLEMENTAL STATEMENT OF FACTS

While there was a great deal of dispute as to the facts at the trial of this case which we will mention where important for the most part under our following separate reasons why this Court should not grant a writ of certiorari, nevertheless there are some statements contained in the Petitioners' preliminary statement of the case which call for a correction or elaboration at the outset.

To begin with, the evidence adduced by the Petitioners themselves reveals that the system of wholesaling under attack was developed in the United States in the 1920s and the 1930s as a means by which independent retail merchants could compete with the chain stores which at one point were rapidly driving smaller stores out of business. (R. 126-127). Under the system the wholesaler buys in largely carload lots, receiving quantity discounts for the same. Under the Scrivner-Boogaart program, which is similar to that of many others, cost to

the wholesaler is then increased 3% across the board plus 3/4 of 1% for freight upon sale to retailers. One of the principal advantages to the retail customer is the mass delivery twice-weekly on the placement of a single order to the wholesaler. This frees the merchant from having to deal with multiple salesmen or from increasing overhead by the addition of buyers for his store. (R. 107-108, 152, 155, 156, 226, 261, 269, 271). The retailers may also take advantage of a "central billing program" which allows them to receive goods *directly* from suppliers other than the defendant wholesaler at quantity discount prices, but the wholesaler guarantees the payment to the other suppliers, pays the same, and then collects from the retailer. Any *cash* discount afforded by the other suppliers (usually 2%) is taken by Scrivner-Boogaart as a consideration for this service (Pl. Ex. 33, R. 94).

In all, this system has resulted in the lowering of wholesale grocery mark-ups throughout the United States over the past forty years from 12% or 15% down to about 4%. The stores so operating are known in the industry as "voluntary wholesale groups". (R. 78, 85).

There also developed yet a third type of grocery wholesaler, competitive to both the chains and the voluntary wholesale groups, known as "co-ops", in which individual retail merchants own the wholesaler supplying them, and which likewise use quantity purchasing to

lower prices. In Tulsa, a co-op known as "Affiliated Foods" services Thrift-T-Wise Stores and AG Stores (R. 129, 144).

In the Tulsa area where there are in excess of 400 retail grocery outlets, Scrivener-Boogaart supplies 10 stores, of which number it owns either in whole or in part 4 stores. Of the remaining 6 stores, five have entered into a "sublease agreement" with the Respondent which is the subject of the attack in this lawsuit. Of the entire Tulsa area retail grocery sales, Scrivner-Boogaart-supplied stores account for only 1 to 2% (R. 156, 157, 158, 139, 140, 162, 234). The retail grocery market in Tulsa was partially divided according to one survey in 1969 as follows: Safeway 31%, Warehouse Markets 11%, Red Bud Stores 1%. (R. 222). Scrivner-Boogaart-supplied stores use a common name, "Red Bud Stores", for the most part.

In all, Scrivner-Boogaart supplies approximately 120 stores in the several states in which it operates, twenty-five of which are presently under the sublease agreement in question. (R. 139). The total sales of Scrivner-Boogaart during 1969 for its entire operation amounted to one-hundred ten million dollars, but only approximately 1/20 of 1% or $55,000 was represented in sales of products in which the Petitioners and Respondent actually competed. (R. 110, 96). For simplicity we shall refer to these type of products as "auto accessory products" throughout this brief. Of course, since only 5 stores, out of a total

of 120 stores supplied by Scrivner-Boogaart, had subleases and were involved in the Tulsa area, only a small portion of the annual total of $55,000 could have been involved in the Tulsa area.

The Petitioners on the other hand had total sales in 1969 of $447,000, of which approximately 65% or 75% was to grocery stores. (R. 189, 191, 205). Smith sells auto accessory parts to other outlets such as service stations, as well, but Scrivner-Boogaart does not. In the Tulsa area Smith services a total of approximately 70 to 80 outlets. (R. 206-207). His largest customer by far, however, is a chain store known as "Warehouse Markets" and his second largest customer during the entire period in question was the group of stores supplied by Scrivner-Boogaart, known as "Red Bud Stores". (R. 191-194). Smith's sales to Warehouse Markets represents about 95% of that chain's auto accessory product requirement, whereas Smith's sales to Safeway and other chains and to stores of the six other competing voluntary wholesale groups is nil. (R. 207). The Respondent carries between seven and eight thousand different items available for supply to retail merchants. Out of this number only a handful, about 14 in number, represent auto accessory products. (Pl. Ex. 18, R. 252). The Petitioner Smith carries approximately 400 different auto accessory products. The Red Bud grocery stores in question carry far less than 1% of their total inventory in auto accessory products,

from whatever source. (R. 96). Price lists showing a comparison between the Petitioners' and Respondent's competing products reveal several items wherein the Petitioners prices were better, and several items wherein the Respondent's prices were better. (Pl. Ex. 38, R. 246). In addition, the evidence disclosed that a third competitor had taken sales away from both the Petitioners and Respondent in certain instances because of generally lower prices. (R. 257). Though Smith Sales Company sales to Red Bud stores were lower in volume than to its prime customer, Warehouse Markets, nevertheless Smith's sales to Red Bud stores exceed those of Scrivner-Boogaart in the competing area and in fact Red Bud stores represented Smith's second largest customer! Smith frequently sold to Scrivner-Boogaart's wholly owned stores as well as to Red Bud stores operating under the sublease in question. (R. 150).

In the case of sublessees Scrivner-Boogaart arranges credit for them for buying of fixtures and the intial stocking of their stores by co-signing the obligations with the sublessees, and likewise takes the prime responsibility for the rental of the premises where the store is located. Frequently the independent merchant is unable to get such credit or lease the premises without such aid although Scrivner-Boogaart by no means is the only wholesale grocer through whom such assistance is available. (R. 158, 272). In the Tulsa area alone six similar programs are in operation. (R. 154, 158).

Against this background, the Petitioners commenced suit in August, 1967 alleging a loss of $10,000 because of foreclosure from sales to Red Bud stores, including specifically an alleged loss of $884.01 representing an uncollected sum for goods sold to one Red Bud store known as Fred's Red Bud No. 2 (later Seminole Hills) operated by a sublessee of the Respondent in Tulsa's first urban renewal project area, who had become insolvent and whose stock in trade was replevined by Scrivner-Boogaart under a security agreement in the District Court of Tulsa County, Oklahoma. (R. 169). On this occasion, Scrivner-Boogaart took not only a $36,000.00 loss on accounts due from the retail merchant but after attempting to operate the store itself (and while purchasing occasionally itself from Smith) closed the same because of lack of income, and continues to pay rentals on the empty building to the landlord under the prime lease in the amount of $1250.00 per month for an additional loss of $15,000.00 per year through the period ending in 1980, or the termination date of the original lease. (R. 135, 136).

At the trial of the action Smith produced only two store operators during his entire case in chief; one, Fred Latham, Jr., the former operator of the defunct Fred's Red Bud No. 2 store, and later-to-be business partner of the Petitioner Jimmy T. Smith himself, testified that he had received a letter cancelling his sublease for failure to comply with the provisions of the sublease requiring

65% of purchases to be made from the Respondent, Scrivner-Boogaart. The proof shows that this cancellation was made at the time of and in conjunction with the collection and replevin action brought by Scrivner-Boogaart, and upon advice of counsel in order to regain legal possession of the premises where the store was located as well as legal possession of the inventory itself under a security agreement, contrary to Smith's apparent assertion that the sublease was cancelled *before* the store was closed by replevin action as a means of chastizing Latham for dealing with Smith in violation of the requirements provision of the contract. (R. 135). As a matter of fact, Fred's Red Bud No. 2 was not, however, in violation of the 65% requirements clause, but instead had made purchases equaling 72% of its net sales but did not take issue with the Respondent's mistaken assertion in this regard (R. 115).

The other store operator testifying at the behest of the Petitioners was Carolyn Latham Swinson, former wife of Fred Latham, Jr., who was awarded Mr. Latham's interest in another Red Bud store known as Fred's Red Bud No. 1 in a divorce action which occurred in 1968. Although she testified that she had been obligated to abide by the provisions of the sub-lease at the time of taking over the store from her former husband, she had actually been excused from the advertising program and Scrivner-Boogaart had not said anything to her about the

65% requirement since taking over the store, (R. 177, 182) although she had not met the requirement to the date of trial (R. 115, 182). She further testified that she had been sued by Scrivner-Boogaart the month previous for past due rent in the sum of $3,400.00 and on open account for groceries in the sum of $21,000.00 and had on the Sunday night prior to her appearance in court closed the store she operated. (R. 183). Although Mrs. Latham claims that Roy Brandell, the Treasurer of Scrivner-Boogaart, told her on the occasion that Fred's Red Bud No. 2 closed that the creditors could "go to hell", Mr. Brandell denied this in plain English (R. 248), and whatever may be the importance of such a remark to this anti-trust action, even if it had not been denied, it is less than accurate to assert that it was an admitted "fact" in the trial of the action.

At page 4 of the Petition for Certiorari the Petitioners attempt to equate certain of their customers in size, location and customer type with the Red Bud Stores serviced by the Respondent. They then attempt to contrast the sales of $226,650. by Smith to one group of customers, to the $23,017 made by him to the Red Bud Stores which are serviced by both parties. This approach is fallacious on its face. In the first place he compares Warehouse Market No. 5 in Tulsa, being a store with 25,000 square feet and another Warehouse Market in Claremore, Oklahoma, to Seminole Hills Red Bud Store with

only 12,000 square feet. (R. 201). One store is double in size and the other is located in an entirely different city. Secondly, Smith was shown to have an almost exclusive monopoly in sales to the Warehouse Markets, being its principal supplier and it being a chain store, whereas the Red Bud Stores purchase supplies not only from Smith but from Scrivner-Boogaart and at least one other supplier (R 201, 257). In addition, whereas there were fifteen Warehouse Markets included within the total sales made by Smith, there were only five Red Bud markets subject to the sublease under attack and where any comparative figures were shown by the evidence. This apples-to-oranges comparison by no means stands as admitted by the Respondent.

And, while the Petitioners imply at page 5 of their Petition that the relevant market under consideration and in which the parties competed was one wherein the Respondent supplied twenty-five stores under the sublease in question, actually, the Petitioners own proof showed sales to only five of such twenty-five, all in the Tulsa, Oklahoma, area, and Petitioners did not even attempt to show any comparisons with sales if any, to the remaining twenty sublessees and other stores serviced by the Petitioners. (Pl. Ex. 21, R. 193).

The bald assertion contained on page 6 of the Petitioners' brief that "to buy from Smith, an independent retailer obligated to Scrivner-Boogaart must violate the

contract" is unsound. In the first place this is a conclusion reached by the Petitioners and by no means does it represent an undisputed fact in the case. On the contrary, we believe the facts clearly demonstrate that any merchant subject to the sublease requirements can freely deal with Smith to the extent that a grocery store can practically handle and sell auto accessory products and that the Petitioners' conclusion is basically erroneous. Since, under the sublease retailers had freedom to buy thirty-five per cent of net sales in products from other suppliers, such as Smith, which represented about 20% of their total inventory needs, the basic question arises as to whether or not Smith would *ever* be foreclosed from the retailers operating under the sublease since auto accessory products represent less than 1% of all sales, even in stores where the 65% clause was not complied with or enforced (and Smith presumably had complete freedom to sell to the same). The only evidence admitted at the trial tending to show the percentage of sales of auto accessory products is that shown by Plaintiffs' Exhibits 21A and 22 (R. 194, 117) which showed sales by Foodtown and Fred's Red Bud No. 1 (both stores having sublease clauses but not complying with the same) wherein both such stores purchased less than 1% of their total net sales from Smith.

The Petitioners at page 7 of their petition allude to "warnings" sent by the Respondent to retail customers

having a sublease and attempt to make more of one such incident than the facts warrant. The evidence shows only one such letter was sent, to Fred's Red Bud No. 1 in Tulsa, Oklahoma, but that no enforcement of the sublease requirement was sought at this store. A second letter, terminating a lease at another store was sent, but only after the same had defaulted in its obligations to pay the Respondent several thousand dollars in monies due and owing and *after* a replevin action had been started in State Court to collect the sums in arrears, which action closed the store in question. (R. 135). The letter was sent cancelling the lease on advice of counsel in order to regain legal possession of the premises where the store was located as well as legal possession of the inventory itself under the security agreement. (R. 135).

And of all the statements contained under the statement of facts in the Petition that ring most hollow is that contained on page 8 wherein it is asserted, "The reasonable inference that can be drawn from these facts is that Scrivner-Boogaart by foreclosing the security agreement was actually seeking to apply pressure on the competing wholesalers such as Smith — to keep him and other independent wholesalers from selling to the Scrivner sublessees." This inference is *not* reasonable and defies human nature and business judgment. As earlier shown, Scrivner-Boogaart upon foreclosure of its security agreement took not only a $36,000.00 direct loss on the account

due from the retail merchant in question, but after attempting to operate the store itself upon repossession (and while purchasing occasionally itself from Smith) closed the same because of lack of income, and continues to pay rentals on the empty building to the landlord under the prime lease in the amount of $1250.00 per month for an additional loss of $15,000.00 per year through the period ending in 1980, or the termination date of the original lease. (R. 135, 136). The conclusion reached by the Petitioners that all of this was suffered merely to put pressure on Smith is grossly farfetched; indeed, it is particularly unsound in view of the fact that not only did Red Bud merchants operating under the subleases in question continue thereafter to buy from Smith, but actually made greater purchases of auto accessory products from Smith than they did from Scrivner-Boogaart itslef, and even Scrivner-Boogaart's own stores thereafter continued to purchase such merchandise from Smith! And Petitioners would have the Court believe this in spite of the fact that the "market" Respondent was supposedly foreclosing amounted to only $55,000 per annum to all 120 Scrivner-Boogaart supplied stores. If a greater or more compelling example of throwing the baby out with the bath water exists we can not conceive of it.

Finally, although the Petitioners have alluded to a 100% purchase requirement clause in a financing agreement between the Respondent and said sublessee mer-

chants and to alleged price fixing that "came out at the trial", these matters form no part of their Complaint in this action, nor any part of their theory of recovery at the trial (See Petitioners' Trial Brief, page 1 "Theory of Plaintiffs' Case", R. 22-28). These matters were not a part of the Petitioners' requested instructions in the trial court, formed no part of their prayer for relief, and we do not deem them proper subjects for consideration in this Court, not having been raised or contended over at the trial.

REASONS FOR DENYING THE WRIT

I

The verdict and decision of the jury and trial court is in accord with prior decisions of this Court, as affirmed by a unanimous panel of the Court of Appeals, including an Associate Justice of the United States Supreme Court, retired, sitting by designation.

II

At best, only a de minimis effect on commerce was demonstrated under the sublease in question, the advantages of which far outweighed any adverse effect, and no substantial federal question is presented.

III

The dire consequences of the decision predicted by the Petitioners simply are not supported by the facts.

IV

The Petitioners attempt to infuse theories and issues in their Petition for Certiorari either not raised or litigated in the trial court, or claim errors to which objection was not made at the time of trial.

I

The verdict and decision of the jury and trial court is in accord with prior decisions of this Court, as affirmed by a unanimous panel of the Court of Appeals, including an Associate Justice of the United States Supreme Court, retired, sitting by designation.

It is apparent upon a close reading of the Petitioners' Complaint in the trial court and their Trial Brief (R. 2, 22), that their theory of recovery from the inception of this lawsuit and the principal thrust of their argument is that a *per se* violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act occurred. The Petitioners first of all contended that the independent retail merchant signing a sublease agreement with the Respondent requiring the sublessee to purchase an amount of inventory needs equal to 65% of "net sales" amounted to a tying agreement; i.e., merchants were forced to buy said percentage of their requirements and take the various Red Bud programs (the "tied" products) as a condition of obtaining financing and the sublease of the real estate

involved. In their brief, page 25, before the Court of Appeals, the Petitioners state that the tying product was the "financing extended" to the retailers; and they also argue that the real estate itself is a tying product.

In that brief, at page 27, the Petitioners stated:

> "In the present case Scrivner-Boogaart could have probably extracted the anti-competitive lease that required the independent retailer to buy exclusively from Scrivner-Boogaart by the uniqueness of a retail store location . . . Besides the uniqueness of the lease, Scrivner-Boogaart also used the extension of credit to the retailer as a device to gain the agreement."

However, the Petitioners in this case did not even attempt to prove that the Respondent had some type of dominance or economic power in either (1) money or (2) real estate, but instead relied on the *mere existence* of the agreements themselves as supporting their theory that a *per se* violation of the Sherman and Clayton Acts was involved. The record is clearly devoid of any proof of dominance or economic power over either money or real estate in the case at bar. The Petitioners, recognizing this, would ask that a new theory or extension of the anti-trust laws be accepted by this Court at this time. This is apparent from their posture in the Court of Appeals, where at page 25 of their brief there, they state:

> "However, when the agreements did exist, this is sufficient evidence that Scrivner-Boogaart had the requisite power."

They stated at page 32 of that brief:

> "A combination of *Northern Pacific, Fortner* and *Texaco* supports the conclusion that if the tying agreements existed then Scrivner-Boogaart must have had the power."

This Court has never taken the position the Petitioners would urge, and Petitioners fully appreciate this, because they state at page 32 in their brief in the appellate court below,

> "Still one is faced with the fact that the Supreme Court in the *Fortner* case did not make such a conclusion. It ordered the case remanded so that the Plaintiff could support by evidence the conclusion that U. S. Steel held a dominate position. . ."

There is not a single line of proof in the record of this case wherein the Respondent is shown to have either any dominant, compelling or unique power in the extension of credit to the independent retail merchants. As stated, the Petitioners did not even attempt to prove such a proposition. The only proof on the subject matter of financial credit available to the independent merchants at all was adduced by the Respondent and leads to a completely contrary conclusion. At page 150 of the record, Mr. Clinton, an employee of the Respondent, testified that Scrivner-Boogaart has financed or loaned money to some retail merchants where they do not have any kind of lease or sublease from Scrivner-Boogaart at all. And at page 129 of the record, Mr. Brandell, another employee

of the Respondent, testified that the various programs contained in the sublease agreement are extended to retail merchants who do not have subleases as well as to those who do have them. The record is also clear that the program offered by Scrivner-Boogaart with its sublease is similar to that offered by other competitors in Tulsa County such as the Fleming Stores and Affiliated, Hale-Halsell, Collins-Dietz, and "all wholesalers". (R. 144, 158). Also see the testimony of witness Larry Reasor (R. 272), wherein he indicated that at the time he was extended financing by Scrivner-Boogaart in connection with his non-sublease store, other financing was avilable.

With reference to the question of whether of not Scrivner-Boogaart had any dominance or economic power in supermarket site location or not, the proof was overwhelming that it did not. The direct testimony of Mr. Kirtley, the sales supervisor of Scrivner-Boogaart, showed that the Respondent when selecting a supermarket site had no kind of option or preference on any land nor did they own any in blocks which they had already lined up (R. 158). The witness, Frank Moskowitz, a real estate agent with long experience in commercial development in Tulsa County, Oklahoma, testified that he had located and identified eighty separate sites that had been zoned suitably for grocery store locations in Tulsa during essentially the period in question, and those sites were only those of five acres or more; perhaps another forty or

fifty were available in tract sizes of less than five acres. (R. 275-276). Mr. Moskowitz also testified that in the development of shopping center sites it was not customary nor had he ever known of a grocery or chain store going out and buying land or taking options or preferences on it prior to the intention to actually locate in the specific area. To the contrary, he said they "usually negotiate and are ready to go at the same time they negotiate, and they usually want the owner of the land to build for them". (R. 277).

In *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495, this court in discussing whether or not a tying agreement amounted to a violation of the Sherman Act stated, at page 505:

> ". . . The proper focus of concern is whether the seller has the power to raise price, or impose other burdens in terms such as a tie-in, with respect to any appreciable number of buyers within the market."

The court in reversing and remanding the case to the trial court after an improper disposition of the same on motion for summary judgment, allowed the plaintiff therein an opportunity to prove dominance or market power. In the case at bar, the Petitioners have already had their day in court and the opportunity to show dominance or market power, but have failed to do so, or even attempt to do so, and we believe under the rule of reason any incidental restraint caused by the sublease in question is

clearly "reasonable". See *United States v. Standard Oil Company*, 221 U.S. 1, 33 S. Ct. 502, 55 L. Ed. 619.

And under *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 545, the need to prove economic power sufficient to restrain free competition for the tied product in a tying agreement is made manifest. There, at page 6, this Court stated in referring to tying agreements:

> "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interestate commerce is affected . . .
>
> "Of course, where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item, any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

When the Petitioners argue that the decision of the lower court is in conflict with prior decisions of this Court, it is in fact arguing for an extension of those doctrines clearly apparent in *Fortner and Northern Pacific* that require *proof* or *showing* of economic dominance or

power in order to classify a tying agreement as an unreasonable restraint of trade. The Petitioners in effect admit that no decision of this Court has gone so far as to hold the mere existence of a tying agreement proof of such economic dominance or power, in and of itself, without more. Therefore, the Petitioners' argument that the decision of the trial and appellate court below are in *conflict* with the prior decisions of this Court is not well taken. The requirement of those courts that there be some showing of economic dominance or power was fully *consistent* with the prior pronouncements of this Court, but the Petitioners did not avail themselves of the opportunity presented to them in their day in court.

Furthermore, the decision of the trial court was unanimously affirmed by a panel of the Court of Appeals, which included Associate Justice Tom Clark, retired, sitting by designation, who, of course, has participated in many of the leading anti-trust cases decided by this Court, and who wrote the opinion below.

II

At best, only a de minimis effect on commerce was demonstrated under the sublease in question, the advantages of which far outweighed any adverse effect, and no substantial federal question is presented.

One of the striking circumstances of the case at bar is the origin and amount of the Petitioners' only specific claim of loss presented in the trial court. Petitioners' claim a specific loss of only $884.01 by virtue of a non-collectible account owing Petitioners by one of the retail merchants supplied by Scrivner-Boogaart whose business failed and who likewise failed to pay the Respondent some $36,000 due on account because of his insolvency. While the trial court refused to submit this particular item of loss to the jury for its consideration, the Respondent having argued that it represented merely a loss caused to the Petitioners by virtue of their standing as a creditor and not because of any violation of the anti-trust laws, the appellate court did not reach this particular issue in view of its decision on the other matters presented in the case. The Petitioners also asserted general damages allegedly resulting from a foreclosure of the market and in all prayed for $10,000, which they asked to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C., §15. Thus, from the outset the case has been pitched in a rather low key compared with many of the prior anti-trust matters considered by this Court. And the proof adduced at the trial tending to show the amount of any foreclosure was fully consistent with the Petitioners' modest claim of loss in the first instance.

Although there was evidence that Scrivner-Boogaart's

sales of *all grocery products* to stores operating under the questioned sublease had risen during the period 1966-69 from $1,064,631 to $2,349,923 (Def. Ex. 16, R. 236), there was no evidence introduced indicating that Scrivner's share of the auto accessory products market during that period had any significant rise. In fact the only evidence in the case indicates to the contrary. It is to be noted from Defendant's Exhibit No. 17 (R. 239) that in the example of Fred's Red Bud No. 2 during the period from its opening until October 15, 1966, Scrivner-Boogaart supplied the store with only $243.70 in automotive accessory products (in fact, only an initial stocking of anti-freeze) whereas Smith made repeated small sales to the company to the day of its closing for a total of $2,884.00, or more than ten times the sales of the Respondent. Likewise we note on Defendant's Exhibit No. 19 (R. 239) for the calendar year 1966 Scrivner-Boogaart sold in the way of anti-freeze and motor oil to *all* customers, everywhere, some 120 stores, a total of only 1,405 cases. This averages only a little over ten cases of all products to each store for the entire year. Extrapolating this number of cases against the selling prices listed on the exhibits (Def. Ex. 19, R. 239) and adding 4% for markup and freight, we note that Scrivner-Boogaart's sales of products competing with Smith's products in 1966 amounted to only $9,586.19, itemized as follows:

Product	Cases Sold	Selling Price	Sales	Mark-up and freight (4%)	Totals
Xerex Anti-Freeze	396	$9.60	$3,801.60	$152.06	$3,953.66
Havoline Motor Oil (20 wt.)	326	$7.10	$2,314.60	92.58	$2,407.18
Havoline Motor Oil (30 wt.)	283	$7.10	$2,009.30	80.37	$2,089.67
Double Eagle Oil (30 wt.)	400	$2.73	$1,092.00	43.68	$1,135.68
					$9,586.19

Thus, Scrivner-Boogaart's automotive products sales totalled less than $10,000, on which its profit, even counting a 2% discount for cash payment to suppliers was less than $500! In the same year, Smith, in his first year of operations, sold $97,586.25 in competing products.

Considering that Scrivner-Boogaart's total share of the entire grocery market in Tulsa is probably less than 2%, we can see why the court and jury could very well conclude that this entire case represented a tempest in a tea pot. (R. 140).

The undisputed proof indicates that in 1969 only 1/20th of 1% of the total sales of Scrivner-Boogaart, or about $55,000, was represented in sales of automotive accessory products to stores *everywhere*. (R. 78, 132). Assumming an across the board average per store, something in the total magnitude of $5,000 per year of these products was sold *in the Tulsa area* by the Respondent. This should be contrasted with the Petitioner's total sales of products in 1969 of $447,000, 60% of which was in the Tulsa area.

If any foreclosure resulted, it was de minimis. Nor do we believe that this Court would see the matter differently. No important Federal question exists for this Court to decide.

Even if a question of de minimis damages were not involved, it is apparent that the subleases questioned and the buying requirements provision thereof have served to bestow great benefit on the public and the retail merchants involved and this Court may feel itself assured in refusing a writ of certiorari that this is not a situation or arrangement lacking in redeeming virtues. At least twenty-six specific benefits of the sublease and wholesaler's program were shown by the evidence adduced by the Respondent in the trial court. See Defendant's Exhibit No. 73 (R. 247) which lists the following advantages:

a. Access to good supermarket locations
b. Ability to obtain financial support for building construction
c. Store engineering services for market surveys, store design, equipment procurement, etc.
d. Assistance in initial stocking of merchandise in the store.
f. Assistance in advertising programs at a price he can afford.
g. Access to a trading stamp program if he should choose that method of sales promotion.
h. Assistance in obtaining cooperative advertising allowances from manufacturers.
i. Availability of accounting service at a reasonable price.

j. A ready source for current market information.
k. Periodic merchandising aid from grocery, meat, and produce specialists.
l. Access to private label merchandise.
m. Availability of a reliable low-cost source of supply of merchandise.
n. An efficient, convenient method of ordering provided by that supplier.
o. Elimination of salesmen — which allows the owner time to manage and to greet his customers.
p. Merchandise deliveries in large quantities on a specified time schedule.
q. A low out-of-stock condition.
r. New items evaluated and stocked promptly.
s. Competitive price checks.
t. Suggested retail prices available.
u. Computer generated invoices with zero errors in extensions and footings.
v. Computations of "going-in-gross" on grocery invoices.
w. Assistance in planning and financing store remodelling.
x. Assistance in selection or acquisition of store personnel.
y. Assistance for successful operators in the acquisition of additional locations.
z. Availability of group health and accident coverages and assistance in obtaining casualty and robbery insurance at favorable terms.

In the case at bar, the Petitioners have sought on a showing of very little more than that the agreements existed, to declare them illegal *per se* without that kind of searching judicial exploration of the consequences

such a holding might entail. See *White Motor Company v. United States*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963). On the scant showing made by the Petitioners, amounting to no more than de minimis damages, they would have this court declare void a system of merchandising that has developed over forty years, and without any evidence to the contrary was shown to be a principal means by which the stemming of the tide of grocery chain monopolization had been curtailed. See testimony of the witness Brandell (R. 126-127).

III.

The dire consequences of the decision predicted by the Petitioners simply are not supported by the facts.

Petitioners have at page 21 of their Petition unabashedly stated:

> "Unless the Scrivner-Boogaart subleases are declared illegal, petitioner is foreclosed from virtually all of the retail grocery market."

This is indeed an impressive claim. But there could be no more telling refutation of this assertion than the history of the financial success of Jimmy T. Smith, Petitioner in this action, as evidenced by the proof adduced at the trial of this case.

Unlike that host of anti-trust cases wherein the plaintiffs claimed ruinuous consequences from the activities

of the Respondents, Jimmy T. Smith and Smith Sales Company, enjoyed a prosperous ascendancy in the auto accessory products market in Tulsa County during the period in question. During the four year period 1966-69 which became the essential period in question during the trial, Smith's sales and profits (the latter generated at a gross margin of about 12% of sales) amounted to the following (Def. Ex. 30, R. 246):

Year	Sales	Gross Profits
1966	$119,000.00	$13,814.00
1967	$293,000.00	$17,029.00
1968	$319,000.00	$39,537.00
1969	$447,000.00	$56,591.00

A court and jury could very well conclude from this evidence, coupled with Smith's increase in sales to Red Bud Stores over the same period, that Smith had suffered no damage. Plaintiff's Exhibit 21A (R. 195) shows that increasing trend of sales by Smith to Scrivner supplied stores for the years in question, as follows:

Year	Sales
1966	$13,731.56
1967	20,688.91
1968	28,942.46
1969	23,017.00

The small drop in the last year may be accounted for by the complete closing down of Seminole Hills Red Bud Store (successor to Fred's No. 2) in 1968, by Rolling Hills switch to Park Oil Co. because of the price differen-

tial more favorable than either Smith or Scrivner-Boogaart (R. 257) and by Whittaker's Red Bud (Sapulpa) completely dropping oil products from its inventory (R. 265).

Although the Petitioners have throughout the case attempted to equate the partial requirements clause of the sublease to an *exclusive* dealing contract, the testimony in this case fails to support that position. Mr. Don Spoon, the operator of the Rolling Hills store, which had subleased from Scrivner-Boogaart, stated flatly that there had never been a situation where he could not have purchased from an outside supplier because of the limitations of the requirement clause (R. 258); Mr. Spoon stated that he purchased regularly from Parks Oil Co., an outside supplier; Fred Latham, Jr., the operator of Foodtown, an all night convenience store, bought large quantities of automotive accessory products from Smith, as did Fred's Red Bud No. 1, and for that matter Fred's Red Bud No. 2 prior to its becoming insolvent.

In fact, a close look at Plaintiffs' Exhibits 21A and 22 and Defendant's Exhibit 16 (R. 195, 117, 236) reveal that during the year 1969 with respect to stores where the 65% clause was *not* complied with or enforced (and Smith presumably had complete freedom to sell to the same) he sold less than 1% in automotive accessory products out of the total retail sales made by those stores during the years in question. These were:

Store	Total Retail Sales	Smith's Sales to Store	Percent of Smith's Sales to Total Net Sales
Foodtown	$1,532,514.00	$14,271.00	00.93
Fred's Red Bud No. 1	$ 968,796.00	$ 8,745.00	00.91

Furthermore, although there was evidence that Scrivner-Boogaart's sales of all grocery products rose, as we earlier mentioned, there was no evidence introduced indicating that Scrivner's share of the auto accessory products market during this period had any significant rise. (Def. Ex. 17 and 19, R. 239). Actually, the evidence disclosed that prices established by Smith and Scrivner-Boogaart were basically competitive. On the price comparison shown in Plaintiffs' Exhibit 25 (R. 254) Scrivner-Boogaart had a lower price on two of the items (Champlin CMO and STP Gas Treatment). On Zerex a large difference apparently in Smith's favor is due to the Petitioners' error in reading Scrivner's order book. He attempts to compare the price of cases of quarts with cases of gallons. Several other items were sold by both Smith and Scrivner but were excluded by Smith in his comparison and are shown on Defendant's Exhibit No. 38 (R. 246). These were taken from sales made in 1969; no cash discounts are shown in favor of Smith on these items but even granting them Scrivner still has established a better price on all five items, namely:

Products	Smith's Price	Scrivner's Price
12 — 8 oz. J-Wax Kit	$ 8.40	$ 6.525
12 — 12 oz. J-Wax Kit	$14.86	$11.205
12 — 16 oz. J-Wax Kit	$16.60	$14.027
12 — 16 oz. Car-Nu	$ 7.78	$ 5.782
12 — 13 oz. Vinyl Top Cleaner	$ 7.80	$ 5.872

It is interesting to note that on the last five items Scrivner-Boogaart's markup is 3¾% whereas Smith's markup varies from 22¾% to 37½%.

Thus on the thirteen items compared at the trial of this lawsuit, Scrivner's price was better on seven items and Smith's price was better on six items.

Mr. Don Spoon, the operator of Rolling Hills Red Bud, a store with the questioned sublease, and co-owner and operator of Meadowood Red Bud (owned 51% by Scrivner-Boogaart) chose to use neither Mr. Smith nor Scrivner-Boogaart as his source for auto accessory products because a third competitor could outdo them both. (R. 257-258).

Thus the dire consequences which the Petitioners say will result from a denial of the writ of certiorari are completely contrary to what has transpired in the past. Any foreclosure of Mr. Smith from the market place is a foreclosure resulting from better service or better prices. He has sold more to the stores in question than Scrivner-Boogaart itself. He has had increasing sales to such sublessees during the period in question. And Scrivner-

Boogaart's share of the competitive market has not significantly risen, amounting to merely $55,000 in some 120 stores, only twenty-five of which have the subleases in question, and in only four of these has there been competition between the parties to this suit.

IV

The Petitioners attempt to infuse theories and issues in their Petition for Certiorari either not raised or litigated in the trial court, or claim errors to which objection was not made at the time of trial.

A. Price fixing: Petitioners in their Complaint did not allege price fixing by the Respondent nor did they assert the same in their Trial Brief as a theory of recovery. (R. 2, 22). Further, the Petitioners requested no instructions on the same. The sole feature having any suggestion of price fixing came in a very brief explanation of the Red Bud advertising program at record, page 89. There the witness Brandell testified that a newspaper ad was prepared by the advertising department of the Respondent; that the retailers select the products that will be included in a particular layout at a meeting at noon one day a week; that the prices are decided upon by the group, usually, but there are some that are left open until the last minute be-

fore the ad is to be placed and that one of the Respondent's field counsellors in Tulsa is at such meeting.

As the Court of Appeals, in its opinion, pointed out, there is no proof in the record of any price fixing on automobile accessory products and the Petitioners did not allege or submit their case on a price fixing theory — either at the trial court or on appeal — and it would be highly inappropriate and inequitable to the Respondent to chart this new and different claim at this stage of the proceedings.

B. Exclusive dealing: Although one of the agreements executed by the Respondent and a retail merchant (Pl. Ex. 7, R. 99) contained a clause purporting to require the retailers to purchase all of the owner's merchandise requirements from the Respondent to the extent that it could furnish the same, the original Complaint in this action did not mention the same but alleged that the sublease in question containing the 65% requirements clause was the offending contract. Nor did the Petitioners' Trial Brief stating their "theory of the case" complain of the former agreement, nor was there requested instruction pertaining to the same, or argument against it before the jury. There is no suggestion, either, by the Petitioners that there was every any correspondence about or attempts to enforce this requirement; indeed, it would be contrary to the more liberal terms of the sublease and we believe therefore inoperable as against any particular

retailer. Infusion of this particular contract into the consideration of the case at this stage would be to give it an importance that it has never had in the litigation and to inject a new issue for consideration for the first time.

C. The verdict form: The Petitioners also complained that the court submitted an improper verdict form to the jury. They claimed that this, among other claimed errors, amounted to such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Petitioners did not always have this view of the verdict form. In fact Petitioners' counsel affirmatively agreed to the form of this verdict as reflected by the following exchange found at page 299 of the record:

> "The Court: Wait a minute. Here it may be. 'We, the jury, find that the —' here it is. 'That the defendant violated Section 3 and Section 1 of the Sherman Anti-Trust Act and find for the plaintiff and assess their damages —'
>
> Mr. Doyle: Right.
>
> The Court: That the third one, now.
>
> Mr. Doyle: Yes, sir.
>
> The Court: So let me see all three of them.
>
> Mr. Givens: Yes.
>
> The Court: Now, let me see the three all together there.
>
> All right, now, this is for — all right, now, this would be the plaintiff side, all three.

Mr. Doyle: Yes, sir, and there is the defendant's.

The Court: Fine. Is that agreeable?

Mr. Doyle: Yes, Your Honor.

The Court: All right, fine.

Mr. Doyle: Thank you, Your Honor."

See *Whitney v. Acres* (D.C. Okla. 1965), 247 F. Supp. 763 where certain surplus language in the verdict was brought to the attention of the plaintiff's counsel before the jury was discharged but was not objected to and such action was held to be a waiver of any claim that the verdict was thus void. See also *Western Fire Insurance Co. of Fort Scott, Kansas v. Word* (C.A. 5th, 1942) 131 F. 2d 541, where there was deemed to be a waiver of any error in the form of a verdict when the complaining party did not object at the trial, even though the verdict form did not state the amount due the plaintiff.

While the form of the verdict might have been in different language, surely both the trial court and counsel for the Respondent should be fully entitled to rely upon an affirmative approval of a verdict form by opposing counsel in the trial of the case. This Court should not be asked to grant a writ of certiorari to seek a review of that form at this stage.

D. Evidence of damage: The Petitioners also complain that the trial court overstepped the bounds of propriety in a comment on the evidence which Petitioners

claim had the effect of excluding certain market comparisons from consideration by the jury. Over the objection of the Respondent, the trial court had *admitted* certain evidence pertaining to estimates of sales that the Petitioners felt they could have made but for the sublease in question. The pertinent part of the testimony was as follows (R. 202):

"Q. Now, considering the size and location of Fred's No. 2, and based upon your experience with these Warehouse Markets in this same general area, can you estimate how much you could have sold to Fred's No. 2 from 1966 to 1969 if the market had been free?

A. Yes.

Mr. Givens: I object to that question, Your Honor, and the answer to it. It's highly speculative.

The Court: It is highly speculative but I will tell the jury that it is. Go ahead.

Q. (by Mr. Doyle) What is that estimate?

A. That estimate is roughly $50,000.

The Petitioners contend that the comment of the trial judge (to which they did not object, nor did they move to strike) amounted to exclusion of the evidence from consideration by the jury when coupled with the instruction that the jury should disregard all evidence which is speculative in character. (R. 292).

The real thrust of the Petitioners' assertion of error in this regard is that the court somehow improperly or

prejudicially commented on the quality of evidence that was in fact admitted over the objection of the Respondent. It appears that under Rule 61 of the Rules of Civil Procedure this was at most harmless error, not affecting the substantial justice of the verdict and judgment in the case. Where there is no objection to an improper comment by the court or the objection is not timely, it should not be considered on appeal. See *Northern Ry. Co. v. Miller*, (CA 6th 1962) 285 F. 2d 202. Furthermore, a judge may give his opinion of the evidence in the trial, even in a criminal case, if he clearly instructs the jury that the determination of guilt is in their exclusive province. See *Orloff v. United States*, (CA 6th 1946) 153 F. 2d 292.

Thus the Petitioners seek review by writ of certiorari of what appears to be anything but an important federal question and one of the type of matters in which the trial courts have a great deal of discretion and in which the Court of Appeals found no merit at all.

E. Sublease advantages: Petitioners' claim that the trial court erred in admitting evidence of certain advantages or benefits that retailers enjoyed under the Scrivner-Boogaart subleases and voluntary wholesale program. Although this is one claim of error raised in the trial court their argument does not appear to deny that the twenty-six items mentioned are indeed advantages, but merely that in an anti-trust case the de-

fendant should not be entitled to justify its business procedures where a *per se* violation is claimed. This, of course, begs the question. We have never understood the decisions of this Court as prohibiting consideration of the redeeming virtues of particular contracts or business arrangements in determining whether a claimed restraint of trade is unreasonable or not under the Sherman Act. Certainly, in cases such as *White Motor Company v. United States*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963) this Court has announced its concern for the possible advantages that a particular business arrangement may have. There, at page 263, the Court in discussing whether or not a vertical territorial limitation might constitute a naked restraint of trade stated,

> ". . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack any redeeming virtue' and therefore should be classified as *per se* violations of the Sherman Act."

Thus, the Petitioners seek review of the judgment below partly on the grounds that the trial court permitted the Respondent to introduce evidence of the advantages or benefits of its business arrangement, under the claim that it was erroneous to do so in view of the clearly *per se* character of the violation charged. However, this overlooks the decisions of this Court indicating that it *must* examine the full scope of the defendant's activities to

determine whether or not a *per se* violation does in fact exist. In essence, the Petitioners argument is no more than another way of stating that under all of the evidence submitted *by them* there could be no doubt that a *per se* violation existed and that it was therefore unnecessary for the court to consider the favorable impact of the subleases on commerce. This argument is merely cumulative to the principal argument of the Petitioners that there is a conflict in the decision of the court below and prior decisions of this Court; it does not amount to a proper argument that the trial court so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

There is no conflict in the decision below and prior decisions of this Court; no substantial federal question is involved and only a matter of de minimis damage was presented for consideration in the trial court; the Petitioners seek to advance new theories or claims of errors not raised in the trial court, and a writ of certiorari should not therefore issue in the case at bar.

Respectfully submitted,

JACK R. GIVENS
1700 Fourth National Bank Building
Tulsa, Oklahoma 74119
Attorney for Respondent